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No. 82-914

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In The

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER MONSANTO COMPANY

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QUESTIONS PRESENTED

1. Should non-price vertical restrictions, normally tested under the rule of reason, be subjected to a *per se* rule merely because they are *alleged* to be part of a vertical price-fixing conspiracy?
2. Can a *per se* unlawful vertical price-fixing conspiracy be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract?

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Reply Brief Of Petitioner Monsanto Company¹

This Court granted Monsanto's petition for certiorari to consider two antitrust issues of substantial importance to the nation's business community: (1) when should non-price distribution restrictions, normally tested under the rule of reason, be condemned *per se* as part of price fixing; and (2) can a *per se* unlawful price-fixing conspiracy be inferred from the termination of a distributor following price complaints from other distributors?

Spray-Rite does not address these questions of antitrust policy. Instead, it argues the evidence and urges this Court to affirm the judgment below without considering the issues or defining the proper legal standards. The essence of its argument is that the verdict is supported by evidence that Monsanto received price complaints from distributors, that

¹The statement of Parties to the Proceedings pursuant to Supreme Court Rule 28 appears at page ii of the petition. In the interim, Monsanto has acquired a 50% interest in Korsil Company, Ltd.

Monsanto was concerned about resale prices and distributor margins, and that Monsanto's non-price programs would tend to influence resale prices.

Spray-Rite's approach underscores the anticompetitive consequences of the Seventh Circuit's decision. The evidence on which both the Seventh Circuit and Spray-Rite rely will typically be present in a competitive market, particularly where, as here, a manufacturer employs non-price programs requiring promotional efforts by distributors. In sustaining a price-fixing verdict on the basis of such normal marketplace evidence, the Seventh Circuit's decision adopted two legal standards that permit juries to speculate in applying *per se* rules. First, it permits juries to condemn non-price restrictions under a *per se* rule based on a mere allegation that they are part of price fixing, without requiring proof linking them to a price-fixing scheme. Second, it permits juries to infer the underlying price-fixing conspiracy from normal marketplace evidence of price complaints, price concern and termination, without requiring proof of a causal connection between complaints and termination. If permitted to stand, the decision will deter procompetitive conduct by exposing manufacturers to *per se* liability whenever they employ non-price restrictions or terminate distributors.

In *Sylvania* this Court recognized that non-price distribution restrictions like those at issue here may promote inter-brand competition—the primary concern of antitrust law—and therefore held that they must normally be tested under the rule of reason.² At trial Spray-Rite disavowed any claim that Monsanto's programs were unlawful under the rule of reason and agreed that Monsanto became a more effective competitor after their introduction. (Pet. Br. 8, 12-13)³ By permitting *per se* condemnation of these demonstrably

² *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 & n.19 (1977).

³ The following abbreviations are used in this Brief: "J.A." (joint appendix filed in this Court by petitioner and respondent);

(footnote continued on next page)

procompetitive programs without requiring proof linking them to price fixing, the Seventh Circuit's decision largely restores the *per se* rule that *Sylvania* overruled.

Sound antitrust policy requires rational tests for determining when a vertical price-fixing conspiracy may be inferred and when non-price restrictions may be condemned *per se* as part of price fixing. Spray-Rite ignores the need for such tests and offers no credible defense of the Seventh Circuit's standards. Monsanto's position, consistent with this Court's precedents, is that non-price restrictions should not be condemned as part of resale price fixing absent proof, *first*, that a manufacturer and its distributors conspired to control resale prices and prevent intrabrand price competition and, *second*, that the non-price restrictions were designed or used to implement that conspiracy. (Pet. Br. 24-27, 41-43)

Tested under the proper standards, the verdict cannot stand. There is no evidence that Monsanto controlled the resale prices of its herbicides or prevented price competition among distributors. To the contrary, uncontested evidence established that there was vigorous interbrand and intrabrand price competition both before and after Spray-Rite's termination. (Pet. Br. 11) Nor is there any evidence of a causal connection between distributor price complaints and Spray-Rite's termination. Finally, there is no evidence that Monsanto's non-price programs did or logically could support a conspiracy to fix the prices of Monsanto herbicides.

The legal arguments advanced by Spray-Rite miss the mark, addressing issues not raised by this appeal. Contrary

(footnote continued from preceding page)

"Cert. Pet." (petition of Monsanto Company for writ of certiorari); "Pet. App." (appendix to petition of Monsanto Company for writ of certiorari); "Pet. Br." (brief on the merits of petitioner Monsanto Company); "Resp. Br." (brief on the merits of respondent Spray-Rite Service Corporation); "Tr." (trial transcript); "PX" (plaintiff's trial exhibit); "DX" (defendant's trial exhibit).

to Spray-Rite's characterization of Monsanto's argument, Monsanto does not challenge the jury instructions that resale price fixing and distribution restrictions that are part of such price fixing are *per se* unlawful. Monsanto's consistent position at trial, on appeal, and in its petition has been that Spray-Rite failed, as a matter of law, to prove either the existence of an underlying price-fixing conspiracy or Monsanto's use of distribution programs as part of such a conspiracy.⁴ Monsanto's agreement to the substantive jury instructions on Spray-Rite's claims does not preclude it from challenging Spray-Rite's failure to prove the elements of those claims or from challenging the erroneous standards applied by the Seventh Circuit in holding the evidence sufficient.

Nor is Monsanto asking this Court to "change the law". (Resp. Br. 39) To the contrary, Monsanto's position is that the Seventh Circuit's decision conflicts with this Court's precedents. While the Court may accept the argument of the United States that resale price maintenance should be tested under the rule of reason, Monsanto's argument is independent of that issue. The decision below cannot stand under existing precedent.

I. Monsanto's Procompetitive Non-Price Practices Were Condemned Under an Improper *Per Se* Rule and Were Not Part of Price Fixing.

This is the first case involving the antitrust legality of non-price distribution restrictions to reach this Court since *Sylvania*. The issue presented by Monsanto's petition is when such restrictions may be condemned *per se* as part of price fixing.⁵ The legal standard adopted and applied by the

⁴ Monsanto thus moved for a directed verdict and judgment notwithstanding the verdict on both issues and appealed the denial of those motions. (Pet. Br. 13-14)

⁵ Contrary to Spray-Rite's contention (Resp. Br. 33), Monsanto does not argue that the legality of its non-price programs should have been submitted to the jury under a rule of reason instruction. Monsanto submitted such an instruction at trial, but

(footnote continued on next page)

Seventh Circuit permits a jury to condemn non-price restrictions as *per se* unlawful merely because a plaintiff alleges that they are part of price fixing. That standard is not a rational test for distinguishing between restrictions that are in fact part of unlawful price fixing and those that *Sylvania* held should be evaluated under the rule of reason.

Spray-Rite offers no credible defense of the Seventh Circuit's standard and ignores the decision's conflict with the policies expressed in *Sylvania*. Instead, Spray-Rite argues that there is sufficient evidence of a connection between some of Monsanto's non-price programs and the alleged price fixing. Viewed most favorably to Spray-Rite, the evidence shows nothing more than an intent to provide distributors with margins sufficient to support promotional programs and efforts to restrict particular distributors' sales territories. (Resp. Br. 20-26) Under the proper test, this evidence is insufficient as a matter of law to establish that Monsanto's distribution programs were part of a price-fixing scheme.

A. The Seventh Circuit's Mere Allegation Standard Will Deter Use of Procompetitive Non-Price Programs, in Conflict With *Sylvania*.

The Seventh Circuit held that Spray-Rite's claim was properly submitted to the jury under a *per se* instruction because Spray-Rite *alleged* Monsanto's non-price programs were part of price fixing:

United States v. Sealy rather than *Continental T.V.* governs this case. *Continental T.V.* applies only if there is no *allegation* that the territorial restrictions are part of a conspiracy to fix prices. Spray-Rite contended, and the jury was instructed, that Monsanto's vertical nonprice restrictions were part of

(footnote continued from preceding page)

withdrew it when Spray-Rite abandoned any claim that those programs were unlawful under the rule of reason. (Tr. 3983) Monsanto's position has consistently been that there was insufficient evidence linking the programs to price fixing and that the issue therefore should not have been submitted to the jury.

an unlawful scheme to fix prices. Thus, *Sealy* and its progeny prescribe the *per se* rule.

684 F.2d at 1237, Pet. App. A-12 (emphasis added; page references omitted). This was plain error. After *Sylvania*, non-price restrictions must be tested under the rule of reason unless there is sufficient evidence linking them to price fixing.

Spray-Rite tries to dismiss the significance of the Seventh Circuit's standard, arguing that the court "was simply comparing the structure of the issues presented in *Sylvania* with the issues presented in *Sealy*." (Resp. Br. 42) The fallacy in this argument is that the court did not apply *Sealy* or any other precedent in holding that there was sufficient evidence to condemn Monsanto's non-price programs under a *per se* rule.⁶ The court neither stated nor applied any test other than its mere allegation standard. That standard is inconsistent with both *Sealy* and *Sylvania*.

In *Sealy* this Court condemned territorial restrictions as part of horizontal price fixing based on specific findings that those restrictions "gave to each licensee an enclave in which it could and did zealously and effectively maintain resale prices, free from the danger of outside incursions." *United States v. Sealy, Inc.*, 388 U.S. 350, 356 (1967). By contrast, applying its mere allegation standard, the Seventh Circuit required no proof that Monsanto's non-price programs were designed or used to implement price fixing. Had it analyzed the evidence under the proper legal standard, the court could not have found any connection between those programs and price fixing.

The practical effect of the decision below is to nullify the antitrust policy adopted in *Sylvania*. Since distribution restrictions inherently limit intrabrand price competition and indirectly affect price, a disgruntled distributor can always allege that they are related to price fixing and are *per*

⁶ See 684 F.2d at 1242 n.11, Pet. App. A-22 n.11.

se illegal. That is precisely Spray-Rite's position. Permitting a plaintiff to reach the jury under a *per se* standard merely by alleging that distribution restrictions are part of price fixing, however, will necessarily discourage the procompetitive use of such restrictions.

Because all vertical distribution restrictions have some indirect effect on price, a rational test is needed to distinguish between those restrictions that are in fact part of price fixing and those that should be tested independently under the rule of reason. Only then can manufacturers safely utilize efficiency-enhancing distribution restrictions, as this Court intended in *Sylvania*. Under the correct test, non-price restrictions should not be condemned as part of price fixing absent proof that a price-fixing conspiracy exists and that the restrictions were designed or used to control resale prices and prevent intrabrand price competition. The Seventh Circuit's mere allegation standard embodies no such requirement.

B. The Record Does Not Support the Verdict that Monsanto's Non-Price Practices Were Part of Price Fixing.

Spray-Rite stresses evidence that Monsanto's non-price programs and policies were intended "to maintain, and increase, profit margins in distribution channels," "to keep the price levels and profit levels as attractive as possible," and "to provide price stability." (Resp. Br. 21, 23) Those programs and policies, as described more fully in Monsanto's brief, consisted of: (1) payments to distributors for selling to retail dealers, for educating dealers and farmers about Monsanto's products, and for stocking dealers' shelves early in the selling season, (2) assignment of each distributor to a non-exclusive area of primary responsibility, and (3) permitting the distributor to pick up products only at warehouses within that area and providing free delivery to the distributor or its customers only within that area. (Pet. Br. 6-7)

Spray-Rite argues that these programs were part of price fixing because they would tend to discourage extraterritorial

sales and sales to non-dealers, thereby operating as territorial and customer restrictions and influencing resale prices. (Resp. Br. 20-26; see Pet. Br. 27-29) But non-price distribution restrictions inherently reduce intrabrand price competition, limit price cutting, and support distributors' margins. Those are *precisely* the economic effects this Court considered when it decided in *Sylvania* that such restrictions, because of their potential for enhancing distribution efficiency and stimulating interbrand competition, should not be condemned *per se*. As the Court recognized, such restrictions "induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer," "induce retailers to engage in promotional activities or to provide service," and limit the "free rider" effect—distributor price-cutting made possible by saving the cost of promotional activities provided by other distributors. 433 U.S. at 55.

All of these procompetitive effects depend on providing some protection for distributor margins by reducing intrabrand price competition. Only in this manner can non-price restrictions induce distributors to promote the manufacturer's products aggressively and to provide desirable services. See, e.g., Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 4 (1977). The inherent indirect effect on resale prices, however, does not equate with unlawful price fixing. See also *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8-9, 23 (1979).

Monsanto's non-price programs worked exactly as contemplated in *Sylvania*. They induced distributors to focus on product promotion, provided better product information to customers, increased the availability of Monsanto products on retailers' shelves, encouraged distributors to develop the market potential for Monsanto herbicides, and increased the efficiency of Monsanto's distribution system. (Pet. Br. 5-7, 29) These programs stimulated interbrand competition, as demonstrated by subsequent changes in the structure and

performance of the herbicide market. In 1968, before Monsanto adopted the challenged programs, it was a weak competitor facing entrenched rivals. It was confronted with a choice between improving its competitive position or quitting the market. By 1972 Monsanto had become an effective competitor. Its sales had increased; its market share had improved; market concentration had declined; and industry output had increased.⁷ (Pet. Br. 4-5, 7-9)

There is simply no evidence linking Monsanto's non-price programs to price fixing. Spray-Rite relies principally on evidence that, at most, shows attempts to prevent certain distributors from selling outside their primary responsibility areas. (Resp. Br. 22-25) Spray-Rite argues that these efforts tended to promote price stability by reducing the number of distributors competing in an area and, therefore, were part of price fixing. At most, Spray-Rite's argument is that Monsanto's responsibility areas operated as territorial restrictions and reduced intrabrand price competition. Again, *Sylvania* recognized that "[v]ertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers," 433 U.S. at 54, but nevertheless held that such restrictions are not *per se* unlawful.

⁷Spray-Rite implies that the "proprietary" herbicides of Monsanto and other manufacturers were not in competition and that the increase in Monsanto's sales was attributable to its introduction of a new product, Lasso, in 1969, rather than to the non-price programs it introduced that year. (Resp. Brief at 4-5, 6-7) But Spray-Rite's own economic expert agreed that "the herbicide industry was a highly competitive industry" and that Monsanto improved its market position not only because it had good products, but also because it hired more salesmen, promoted its products and emphasized technical selling. (Tr. 2990, 2993-95) The successful introduction of Lasso cannot be divorced from the promotional programs that accompanied it, particularly those that focused on distributors' educational and promotional efforts. (See PX 139 at 38, Tr. 1607, 3034, 3035, 3307, 3309-10)

Spray-Rite does not contend that Monsanto's non-price programs eliminated intrabrand price competition. It identifies no evidence that those programs were designed or used to control resale prices and prevent intrabrand price competition.⁸ Indeed, it has never explained how those programs could have supported price fixing in light of their nature. (Pet. Br. 27-29) Spray-Rite does not dispute that Monsanto assigned 10 to 20 distributors to each primary responsibility area. (Pet. Br. 28) Thus, even if Monsanto had rigorously enforced those non-exclusive areas as ironclad territorial restrictions, they could not have given each distributor "an enclave in which it could . . . effectively maintain resale prices, free from the danger of outside incursions." *United States v. Sealy, Inc.*, 388 U.S. at 356.⁹

In sum, Spray-Rite has failed to defend the Seventh Circuit's mere allegation standard or to address the policy concerns it raises. There is no evidence linking Monsanto's non-price programs to price fixing under the correct standard.

⁸Spray-Rite's misquotation of testimony by former Monsanto employee McCormick conveys an incorrect impression that Monsanto intended to create exclusive territories to prevent price competition among distributors. Spray-Rite quotes McCormick as testifying that "if we could keep our distributors out of a state, this would stabilize the market." (Resp. Br. 23)(emphasis deleted) McCormick actually testified that "if we could keep *four* distributors out *in* a state, this would stabilize the market." (Tr. 1936-37)(emphasis added) At most, this evidence suggests a desire to "reduce intrabrand competition by limiting the number of sellers . . . competing for the business of a given group of buyers." *Sylvania*, 433 U.S. at 54. As such, it is fully consistent with the lawful use of territorial restrictions to induce distributor promotional efforts and discourage free riding.

⁹Monsanto's primary responsibility areas did not operate as ironclad territorial restrictions. Spray-Rite does not dispute that Monsanto distributors sold substantial quantities of Monsanto products to customers outside their primary responsibility areas. (Pet. Br. 28-29)

This Court should therefore reverse the judgment with respect to those programs and direct the court of appeals to remand to the district court for entry of judgment on behalf of Monsanto.

II. The Price-Fixing Verdict Was Affirmed Under an Improper Conspiracy Rule and Cannot Be Sustained on Any Theory of *Per Se* Unlawful Price Fixing.

Spray-Rite's argument on the conspiracy issue likewise avoids the question presented for review. This Court granted certiorari on the question whether a *per se* unlawful price-fixing conspiracy can be inferred "solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract." (Cert. Pet. i) Spray-Rite neither defends the Seventh Circuit's conspiracy standard nor suggests any test for inferring a conspiracy from the circumstances of a distributor termination. Instead, Spray-Rite argues that the evidence establishes a conspiracy under "any legal test." (Resp. Br. 45) Tested under the proper standard, that evidence is insufficient as a matter of law.

A. The Seventh Circuit Improperly Held that "Termination Following Competitor Complaints Is Sufficient to Support an Inference of Concerted Action."

Spray-Rite does not dispute that an antitrust conspiracy may be proven by circumstantial evidence only if that evidence is "significantly probative of conspiracy." See Pet. Br. 32, quoting *First National Bank v. Cities Service Co.*, 391 U.S. 253, 288 (1968). Spray-Rite agrees with Monsanto that "[t]o be probative of conspiracy, the circumstances of a distributor termination must establish a causal nexus between the complaints of other distributors and the manufacturer's decision to terminate." (Resp. Br. 47, quoting Pet. Br. 37) Finally, Spray-Rite does not contend that the factors comprising the Seventh Circuit's conspiracy standard—distributor price complaints, a manufacturer's concern with

resale prices and termination—establish the requisite causal nexus. Thus, Spray-Rite fails to meet the issue raised by Monsanto's petition.

Spray-Rite also ignores the policy implications of the Seventh Circuit's conspiracy standard. That standard will deter procompetitive behavior in two ways. First, it will inhibit manufacturers from unilaterally terminating distributors even where termination would advance a manufacturer's distribution efficiency, to the ultimate benefit of consumers. Second, by attaching conspiratorial significance to normal communications between manufacturers and their distributors, the Seventh Circuit's standard will impede the flow of information crucial to maintaining efficient distribution mechanisms. These anticompetitive effects will be greatest where manufacturers require promotional efforts by their distributors. (See Pet. Br. 36)

Again, Spray-Rite tries to minimize the anticompetitive consequences of the Seventh Circuit's conspiracy standard by arguing, in effect, that the court did not mean what it said. Thus, Spray-Rite suggests that the court added meaningful content to the standard with its passing statement that evidence of termination "in response to" complaints "is sufficient to raise an inference of concerted action." 684 F.2d at 1239, Pet. App. A-15 to -16. The Seventh Circuit's standard, however, does not *require* evidence that the termination was in response to complaints. *Id.*, Pet. App. A-16. In holding that the evidence was sufficient to establish conspiracy, the court did not identify any evidence that the termination was in response to distributor complaints.

B. The Record Does Not Support the Verdict that Spray-Rite Was Terminated Pursuant to a Price-Fixing Conspiracy.

Spray-Rite's argument is largely a detailed, and often erroneous,¹⁰ recitation of evidence regarding distributor complaints and Monsanto's concern about resale prices. In reciting this evidence, Spray-Rite loses sight of the principle that only concerted behavior is actionable under Section 1 of the Sherman Act. Distributor complaints and a manufacturer's concern about prices, without more, are not probative of concerted action because they fail to establish the necessary causal nexus between complaints and termination. Spray-Rite's effort to discredit Monsanto's explanation for the termination adds nothing. Under Section 1, Monsanto's reason for terminating Spray-Rite is irrelevant absent evidence that the termination resulted from agreement between Monsanto and the complaining distributors. None of the evidence marshalled by Spray-Rite, viewed in the light most favorable to it, supports the inference of such an agreement.

Evidence of Complaints. Spray-Rite recounts in detail the complaints received by Monsanto, but fails to address the economic reality that such complaints are normal market-place reactions by competitors to the activities of their rivals. (Resp. Br. 9-15) Where, as here, a manufacturer's marketing strategy requires distributors to provide promotional services

¹⁰ For example, Spray-Rite repeatedly relies on an unsworn statement of former Monsanto employee Stein as substantive evidence of a price-fixing conspiracy. (See, e.g., Resp. Br. 10, 21, 22, 28-29) In the Seventh Circuit, Monsanto argued that Stein's statement, which had been used during his deposition for impeachment, was improperly received in evidence. (See Brief for Defendant-Appellant Monsanto Company at 63-64; Reply Brief of Monsanto Company at 26-28) The court of appeals agreed that the district court erred in admitting Stein's "speculative testimony," but ruled the error "harmless." 684 F.2d at 1244, Pet. App. A-26 to -27.

that increase distributor costs, complaints about the activities of perceived free riders are inevitable. (Pet. Br. 34-35)

Although it attempts to magnify the significance of the complaints through repetition, Spray-Rite identifies no evidence connecting them to its termination.¹¹ Significantly, in discussing the complaint evidence Spray-Rite omits the dates of most of the complaints. All of these complaints were received either long before or after Spray-Rite's termination. There is no evidence of any complaint about Spray-Rite in the 15 months before termination. During this period, Monsanto renewed Spray-Rite as a distributor. Indeed, Monsanto continued Spray-Rite's distributorship from 1957 until late 1968 even though it was always aware of Spray-Rite's price-cutting and had received price complaints about Spray-Rite beginning at least as early as 1964. (Pet. Br. 39; Resp. Br. 10) Given these undisputed facts, the price complaints relied on by Spray-Rite are not probative of a conspiracy to terminate Spray-Rite.

Faced with this crucial deficiency in its proof, Spray-Rite relies on conjecture and surmise to supply the missing causal connection. Thus, it asserts that two alleged termination threats by Monsanto to Spray-Rite in 1966 and 1967 were prompted by distributor complaints. (Resp. Br. 13-14) Both of these alleged threats related to Spray-Rite's prices to Myers, Inc. Yet, there is no evidence that any distributor ever complained about Spray-Rite's prices to Myers. Building on its unsupported assertion, Spray-Rite further theorizes that "the jury could easily have inferred" that a 1968 telephone call from Monsanto to Spray-Rite regarding its prices to Myers "was the result of one or more distributor complaints." (*Id.* at 14 n.16) Such an inference could be based only on speculation, which this Court has prohibited as

¹¹The Seventh Circuit mistakenly stated that some complaining distributors "requested" that Monsanto terminate Spray-Rite. 684 F.2d at 1239, Pet. App. A-16. There is no evidence of such requests, and Spray-Rite does not contend that such evidence exists.

the basis for a jury verdict. *See Galloway v. United States*, 319 U.S. 372, 396 (1943).

Spray-Rite also mischaracterizes a post-termination conversation between Monsanto's Fischer and Spray-Rite's owner, Donald Yapp, as an admission that Monsanto terminated Spray-Rite in response to distributor price complaints. Relying solely on Yapp's testimony, Spray-Rite states "[t]he first thing that Fischer told Yapp at the 1968 meeting regarding Spray-Rite's termination was that Monsanto had received many complaints about Spray-Rite's prices." (Resp. Br. 14 n.14; *see also* Resp. Br. 15) Yapp did not testify, however, that Fischer referred to price complaints from *distributors* rather than the complaints from Monsanto's own employees. Later, Spray-Rite compounds this speculation, asserting that Yapp was "informed by Monsanto at the time of termination that Spray-Rite's pricing policy was the cause of its termination. *See supra* at 14-15." (Resp. Br. 45-46) There is no evidence to support this assertion.

Price Concern Evidence. The evidence of Monsanto's interest in resale prices similarly fails to provide the requisite causal link. Monsanto's interest in price levels, its internal discussions about distributor prices, and its attempts to ascertain distributors' resale prices do not make the conspiracy inference more plausible than the competing inference of lawful unilateral termination. Resale prices bear directly on a manufacturer's sales and profitability. Where a manufacturer has initiated programs requiring distributor promotion and service, resale prices also affect distributors' incentive and ability to support those programs. In short, interest in prices is to be expected of a manufacturer acting unilaterally in its economic self-interest and is therefore not probative of conspiracy. (*See* Pet. Br. 34)

Spray-Rite also suggests that Monsanto's desire to maximize its profits on its new herbicide, Lasso, supports the conspiracy inference. (Resp. Br. 26-27) Maximizing profits simply is not inconsistent with lawful, unilateral conduct.

The profit motive is the driving force in a competitive economy. Thus, evidence of Monsanto's interest in the pricing of Lasso or its other products cannot support the conspiracy inference.

Boycott Evidence. Lacking evidence of a causal nexus between complaints and termination, Spray-Rite seeks support in the jury's separate finding of a post-termination boycott. The boycott verdict, however, was premised on a later conspiracy that was entirely separate from the earlier alleged price-fixing conspiracy.¹² Moreover, the Seventh Circuit did not rely on the group boycott in holding that the jury could infer a price-fixing conspiracy from termination following distributor complaints.¹³ On this basis alone, the group boycott is irrelevant to the question presented for review.

¹²The jury was instructed that Spray-Rite claimed, *first*, that Monsanto conspired with distributors to fix prices and as part of that conspiracy terminated Spray-Rite and instituted territorial restraints and, *second*, "[t]hat after plaintiff's termination defendant and one or more of its distributors conspired or combined to restrict plaintiff's access to defendant's products." (J.A. A-19 to -20, Tr. 4350) Similarly, the special interrogatories asked the jury to answer whether Monsanto had engaged in two separate conspiracies: a conspiracy between Monsanto and "one or more of its distributors to fix, maintain, or stabilize resale prices on Monsanto herbicides" (Special Interrogatory No. 1, J.A. A-27), and a post-termination conspiracy involving Monsanto and "one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto's herbicides after 1968" (Special Interrogatory No. 3, J.A. A-28). On appeal Spray-Rite again claimed two separate conspiracies. (*Compare* Spray-Rite's brief before the Seventh Circuit at 5 *with* 15 and *compare* 46-57 *with* 61-68.)

¹³*Compare* 684 F.2d at 1235-36, 1240, Pet. App. A-9 to -11, -18 (discussing the group boycott) *with* 684 F.2d at 1233-35, 1238-40, Pet. App. A-5 to -9, -14 to -17 (discussing price fixing and termination).

Nor does the boycott verdict logically support the inference of a conspiracy to terminate Spray-Rite. The premise of Spray-Rite's termination claim was that Monsanto *acceded* to the desires of complaining distributors in terminating Spray-Rite. Its boycott claim was the reverse: that Monsanto *coerced* some of its distributors into refraining from selling to Spray-Rite after termination.¹⁴ (Resp. Br. 35-36) Thus, Spray-Rite posited two separate conspiracies with two distinct groups of distributors as co-conspirators. The finding of an alleged post-termination conspiracy with one group of distributors contributes nothing to the hypothesis that Monsanto had earlier conspired with a different group of distributors to terminate Spray-Rite.

Equally unavailing is Spray-Rite's argument that "Monsanto's business explanation for Spray-Rite's termination is inconsistent with the post-termination boycott." (Resp. Br. 16) Regardless of the circumstances under which a distributor is terminated, there are numerous business reasons why a manufacturer might subsequently participate in an effort to restrict that distributor's access to its products. For example, a manufacturer might agree with its existing distributors to do so in order to prevent the former distributor from free riding.¹⁵ Apart from the question of its legality, such action is fully consistent with unilateral termination of the distributor to protect the manufacturer's marketing

¹⁴The Seventh Circuit's affirmance of the boycott verdict was premised solely on evidence that some Monsanto distributors declined to sell to Spray-Rite after termination, that Monsanto "threatened" one distributor with termination if it sold to Spray-Rite, and that it told another distributor not to sell to Spray-Rite. 684 F.2d at 1240, Pet. App. A-18.

¹⁵See Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 6-7 (1977); Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?*, 67 Va. L. Rev. 1457, 1502-05 (1981). See generally R. Bork, *The Antitrust Paradox*, 330-46 (1978).

strategy, or for any other reason. The finding that Monsanto engaged in a post-termination boycott is therefore not probative of an earlier and separate conspiracy to terminate Spray-Rite.

Even assuming the boycott discredited Monsanto's explanation for termination, that would not support the inference that the termination was concerted. Spray-Rite's argument is that the boycott establishes a price motivation for termination. (Resp. Br. 16, 35-38) Improper motive, however, does not equate to concerted action. Consistent with this Court's precedents, the Seventh Circuit recognized that "[a] manufacturer's unilateral termination of a distributor is not unlawful regardless of whether it is motivated by an illegal purpose." 684 F.2d at 1234, Pet. App. A-7; see *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *United States v. Colgate & Co.*, 250 U.S. 300 (1919). In short, Monsanto's motive for terminating Spray-Rite is simply not probative of an agreement with other distributors.

C. The Record Does Not Support the Verdict that Monsanto Conspired to Fix the Prices of Its Herbicides.

Having failed to identify evidence probative of a conspiracy to terminate, Spray-Rite cannot sustain the price-fixing verdict under any other theory of vertical price fixing.¹⁶ The undisputed evidence of price behavior in the herbicide market belies the existence of a price-fixing conspiracy. There was vigorous price competition among Monsanto distributors both before and after Spray-Rite's termination. Monsanto's distributors regularly sold below

¹⁶ Spray-Rite fails to address whether the Seventh Circuit was justified in holding that the termination of a single price-cutter, if concerted, constitutes *per se* unlawful price fixing. In so holding, the court created a new category of *per se* price fixing in violation of this Court's admonition that "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972).

suggested resale prices, and their prices were not uniform. (Pet. Br. 11-12) As one of Spray-Rite's witnesses testified, "Price cutting was a way of life with distributors." (Tr. 2234) No distributor ever conformed its resale pricing as a result of any coercion by Monsanto.¹⁷ The uncontested evidence of pervasive price competition among Monsanto distributors negates any inference that Monsanto and its distributors conspired to fix prices.

In contrast to the circumstantial evidence that this Court has held probative of a vertical price-fixing conspiracy, the record here is devoid of any evidence that Monsanto controlled distributors' resale prices or prevented intrabrand price competition. There is no evidence of written resale price maintenance agreements between Monsanto and its distributors, *cf. Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), no evidence of implied agreements having the purpose or effect of pervasive resale price maintenance, *cf. United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), and no evidence that Monsanto coerced its distributors into adhering to suggested prices, *cf. United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). In sum, there is no evidence of a price-fixing conspiracy, and the issue should not have been submitted to the jury.

¹⁷ Contrary to Spray-Rite's assertion, there is no evidence that Monsanto applied coercion to distributors Terra and American Oil Company to conform their prices. The transcript pages cited by Spray-Rite do not show that either distributor acquiesced to price coercion by Monsanto. *Compare* Resp. Br. 29-30 with Tr. 1880-90, 1931-34.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be reversed, with directions to remand to the district court for entry of judgment on behalf of Monsanto on both issues presented.

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